

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

**JUAN RAMON GUERRIDO**

Claimant

VS.

**D & L PAINTING, INC.**

Respondent

AND

**CONTINENTAL WESTERN INS. CO.**

Insurance Carrier

Docket No. 1,031,067

**ORDER**

Claimant requested review of the November 14, 2006, preliminary hearing Order entered by Administrative Law Judge Steven J. Howard.

**ISSUES**

The Administrative Law Judge (ALJ) found that claimant was not entitled to temporary total disability benefits.

Claimant requests review of the ALJ's order denying temporary total disability benefits. Claimant contends that respondent's argument that he is an illegal immigrant is misplaced and that he is an employee as defined by K.S.A. 2005 Supp. 44-508. As an employee, claimant argues that he is entitled to claim benefits under the Workers' Compensation Act, including temporary total disability benefits. Claimant requests that the Board reverse the preliminary hearing Order entered by the ALJ.

Respondent and its insurance carrier (respondent) argue that the Board lacks jurisdiction to consider this appeal since the only issue presented is whether claimant is entitled to temporary total disability benefits. Respondent asserts it stipulated to compensability for purposes of the preliminary hearing and did not raise any of the jurisdictional issues listed in K.S.A. 44-534a. Respondent also contends the ALJ did not exceed his jurisdiction in denying the relief requested. In the event the Board decides it has jurisdiction to consider this appeal, respondent requests the ALJ's Order be affirmed

because claimant is an illegal immigrant and cannot legally return to work even if he had no restrictions.

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Based upon the record presented to date, the undersigned Board Member makes the following findings of fact and conclusions of law:

There was no testimony taken in the preliminary hearing, and the only issue, payment of temporary total disability benefits, was submitted to the ALJ by stipulation. For purposes of the preliminary hearing, the parties entered into the following stipulations, as set out in the transcript of the preliminary hearing:

- (1) Claimant sustained an occupational accident on May 25, 2006.
- (2) Claimant presented documentation to the employer at the time he was hired, and it has subsequently been determined that claimant may have entered the United States illegally and is not a legal immigrant.
- (3) The Form K-WC E-3, Application for Preliminary Hearing, was filed on October 2, 2006.
- (4) The applicable temporary total disability benefit rate is \$335.
- (5) Dr. Burton is treating the claimant, and he has restricted claimant from working as of October 2, 2006.
- (6) Before October 2, 2006, claimant had been restricted to light duty work.
- (7) In the event claimant is found to be legally in the United States, respondent would accommodate claimant with the restrictions he presently has in effect.

In the instant case, the ALJ denied claimant's request for temporary total disability benefits. The Order does not specify the reason behind this denial.

K.S.A. 44-551(b)(2)(A) provides that the Board shall not review a pending preliminary hearing order entered by the ALJ unless it is alleged the ALJ exceeded his or her jurisdiction in granting or denying the requested relief.

K.S.A. 44-534a allows appeals from preliminary hearings with regard to the following disputed issues which are to be considered jurisdictional and subject to review by the Board:

- (1) Whether the employee suffered an accidental injury;
- (2) Whether the injury arose out of and in the course of the employee's employment;
- (3) Whether notice is given or claim timely made;
- (4) Whether certain defenses apply.

The parties' stipulations appear contradictory. Stipulation No. 5 says that claimant is restricted from working, but stipulation No. 7 says respondent will accommodate claimant's restrictions. In its brief to the Board, claimant argues that "Dr. Burton has not authorized Claimant to return to work with or without restrictions."<sup>1</sup> Also, stipulation No. 2 says claimant is not a legal immigrant, but stipulation No. 7 says respondent will accommodate claimant's restrictions in the event claimant is found to be legally in the United States. In its brief to the Board, claimant states that "respondent stipulated that claimant's injury is compensable." But claimant's brief also asserts:

The jurisdictional basis for this appeal is that the Respondent's defense that an illegal immigrant is not entitled to temporary total disability compensation does not apply to the case at hand. This was a defense raised by Respondent at the Preliminary Hearing.<sup>2</sup>

Nevertheless, because it was stipulated that claimant was an illegal immigrant, this could give rise to an issue of whether the relationship of employer and employee existed, and that circumstance goes to the compensability of the claim. It could also give rise to an issue of whether a claimant who cannot legally work in this country is barred from receiving temporary total compensation as a matter of law. Both of these purported defenses are argued by respondent. And as these purported defenses could go to the compensability of the claim, they are jurisdictional issues under K.S.A. 44-534a. Therefore, the ALJ may have denied claimant benefits based on an issue the Board would have jurisdiction to review on an appeal from a preliminary hearing order.<sup>3</sup> However, there is also information in the file to indicate the Judge's denial could stem from a finding that claimant is not temporarily totally disabled, a finding not contained within the jurisdictional items listed in K.S.A. 44-534a. The Board is unable to ascertain from the record the basis for the denial of benefits, so the Board is unable to determine its jurisdiction to hear an

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<sup>1</sup> Appellant's Brief filed Dec. 15, 2006, at 1.

<sup>2</sup> *Id.* at 2.

<sup>3</sup> See *Zepeda v. Nancy & Nora Flores d/b/a L&F Original, LLP, and Pyramid Roofing Co., Inc.*, No. 1,023,273, 2006 WL 1933443 (Kan. WCAB June 15, 2006).

appeal from that order. This case is remanded with directions that the ALJ state, with specificity, the reason or reasons for his denial of temporary total disability compensation.

**WHEREFORE**, it is the finding, decision and order of this Board Member that this matter be remanded back to Administrative Law Judge Steven J. Howard for further findings consistent with this decision. The Board does not retain jurisdiction over this proceeding. Should either party be aggrieved by any amended order rendered by the ALJ in this matter, the appropriate procedure for filing a new application for review by the Board must be filed.

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of February, 2007.

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BOARD MEMBER

c: David Curotto, Attorney for Claimant  
Nathan D. Burghart, Attorney for Respondent and its Insurance Carrier  
Steven J. Howard, Administrative Law Judge